Supreme Court, U.S.
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No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1998

CHOWCHILLA WATER DISTRICT AND MADERA IRRIGATION DISTRICT

Petitioners

vs,

NATURAL RESOURCES DEFENSE COUNCIL, ET AL.

Respondents

On Petition for Writ of Certiorari
To the United States Court of Appeals
for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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39 pp

I.
THE QUESTIONS PRESENTED FOR REVIEW:

Congress authorized the Central Valley Project on the basis that the San Joaquin River between Gravelly Ford and Mendota Pool would be dry in the absence of flood control releases.

In 1939 Petitioner, Madera Irrigation District ("Madera") pursuant to a contract with the United States, conveyed its Friant Dam site and its rights to divert water from the San Joaquin River to the United States to be used in the construction of the Central Valley Project in return for a promise by the United States to deliver to Petitioner, a permanent specified quantity of water from the Project, pursuant to successive Water Service Contracts at a price no higher than that charged to other Friant contractors.

In 1949, with the consent of the United States, a portion of this Contract was assigned to the Petitioner Chowchilla Water District ("Chowchilla") who in 1950 executed a forty year contract, which for its term satisfied Chowchilla's rights under the 1939 Contract and which recognized Chowchilla's right of renewal under the 1939 Contract.

In 1993 Chowchilla, under its 1939 Contract rights, executed a forty year renewal contract for its allocated water supply. This contract was voided by the district and circuit courts on the basis that a Section 7 consultation under ESA had not been completed when the contract was executed.

Question for Review Number 1: Where Congress, by legislation, has directed the Secretary of Interior not to release water from Friant Dam, a part of the Central Valley Project, for the purpose of restoring fish life below the dam, without a further act of Congress, can Section 5937 of the

State of California's Fish and Game Code require the Secretary to make such releases?

Question for Review Number 2: Where Chowchilla has a vested right of renewal for a definitive Project water supply from the United States, protected by the 5th Amendment, is a Section 7 consultation necessary as a prerequisite to renewal?

Question for Review Number 3: Was the Section 7 review completed when Chowchilla's contract became effective?

II.
THE PARTIES TO THE PROCEEDING

A. PLAINTIFFS AND RESPONDENTS:

NATURAL RESOURCES DEFENSE COUNCIL; TROUT UNLIMITED OF CALIFORNIA; BAY INSTITUTE OF SAN FRANCISCO; CALIFORNIA NATURAL RESOURCES FEDERATION; CALIFORNIA SPORTS FISHING PROTECTION ALLIANCE; CALIFORNIA TROUT; FRIENDS OF THE RIVER; NORTHERN CALIFORNIA GUIDES ASSOCIATION; PACIFIC COAST FEDERATION OF FISHERMAN'S ASSOCIATIONS; SAN JOAQUIN RAPTOR RESCUE CENTER; SIERRA CLUB; STANISLAUS AUDUBON SOCIETY, INC.; UNITED ANGLERS OF CALIFORNIA; CALIFORNIA STRIPED BASS ASSOCIATION and NATIONAL AUDOBON SOCIETY.

B. FEDERAL DEFENDANTS:

ROGER PATTERSON, AS REGIONAL DIRECTOR OF THE MID-PACIFIC REGION OF THE UNITED STATES BUREAU OF RECLAMATION; AND BRUCE BABBITT, AS SECRETARY OF THE UNITED STATES DEPARTMENT OF THE INTERIOR.

C. NON FEDERAL DEFENDANTS AND PETITIONERS:

FRIANT WATER USERS AUTHORITY; ORANGE COVE IRRIGATION DISTRICT; LINDMORE IRRIGATION DISTRICT; TERRA BELLA IRRIGATION DISTRICT; EXETER IRRIGATION DISTRICT; IVANHOE IRRIGATION DISTRICT; LOWER TULE RIVER IRRIGATION DISTRICT; SAUCELITO IRRIGATION DISTRICT; DELANO-EARLIMART IRRIGATION DISTRICT; TEAPOT DOME IRRIGATION DISTRICT; ARVIN EDISON WATER

STORAGE DISTRICT; SOUTHERN SAN JOAQUIN MUNICIPAL UTILITY DISTRICT; SHAFTER-WASCO IRRIGATION DISTRICT; PORTERVILLE IRRIGATION DISTRICT; STONE CORRAL IRRIGATION DISTRICT; TULARE IRRIGATION DISTRICT; LINDSAY-STRATHMORE IRRIGTION DISTRICT; CHOWCHILLA WATER DISTRICT and MADERA IRRIGATION DISTRICT

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V.
CITATIONS OF THE OFFICIAL AND UNOFFICAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE

The decision of the United States Court of Appeals for the Ninth Circuit is reported in 146 F.3d 1118. One of the several applicable orders of the United States District Court is reported at 791 F. Supp.1425.

VI.
BASIS FOR JURISDICTION

A. The decision of the United States Court of Appeals for the Ninth Circuit was filed on June 24, 1998.
B. The Petition for Rehearing was filed on August 5, 1998.
C. The Petition for Rehearing was denied on September 8, 1998.
D. The statutory provisions believed to confer on this Court jurisdiction to review on writ of certiorari the judgment or order in question is 28 U.S.C. §1254(a) and 43 U.S.C. §390uu.

VII.
THE CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED IN THE CASE

1. Fifth Amendment of the Constitution of the United States.

2. Section 7 of the Endangered Species Act (ESA) 16 U.S.C. § 1530.

3. CVPIA § 3406(c) Public L. No. 102-575, 1992 U.S.C. (106 Stat.) at 4721.

4. Section 8 of the Reclamation Act of 1902 (43 U.S.C. § 383)

5. California Fish Game Code §5937.

VIII.
STATEMENT OF THE CASE

A. WHY CERTIORARI SHOULD BE GRANTED.

This case raises issues of national importance. The first of these is whether, in the operation of the largest reclamation project in the United States, a state law can countermand a direct Congressional edict on how the Project is to be operated in a manner that may result in the loss of over one million acres of highly developed farm land.

The second is the scope of the consultation requirements of Section 7 of the Endangered Species Act. (ESA)

Further, the decision of the of the United States Court of Appeals for the Ninth Circuit is in conflict with the decisions of two other Circuits.

B. THE FACTS MATERIAL TO THE QUESTIONS PRESENTED.

1. THE FRIANT DIVISION OF THE CENTRAL VALLEY PROJECT.

Friant Dam is located on the San Joaquin River. Under both the State and Federal Central Valley Project (CVP), Friant Dam was intended to divert almost all of the flows of the San Joaquin River into Madera Canal to the North, and the Friant Kern Canal to the South. The only releases, other than flood control releases, that were made down the channel were for irrigated riparian croplands between Friant Dam and Gravelly Ford, approximately twenty two miles downstream from the Dam.

The two canals feed water to approximately one million acres of highly developed farm lands on the East side of the San Joaquin Valley.

Except for intermittent flood control releases, the river bed between Gravelly Ford and Mendota Pool, approximately fourteen miles downstream, was to be dry. It has been dry, under operation of the Project, for over sixty years. Under the Project, Delta Mendota Canal was constructed to bring water from the San Joaquin-Sacramento Delta to Mendota Pool to replace the water formerly diverted from the San Joaquin River to crop-lands by the Exchange Contractors. The water rights on the San Joaquin River held by the owners of the "Grasslands" [diversions to native pasture downstream from Gravelly Ford] were acquired by the United States, which together with the quantities obtained from the Exchange Contractors, provided the water to be diverted at Friant to serve crop lands on the East side of the San Joaquin Valley, which were going dry from lack of groundwater.

Friant Dam has limited storage capacity. The water delivered under the contracts with the districts is classified as Class 1, which is supposed to be a firm supply consisting of the first 800,000 acre feet of flow and Class 2, the remaining flows. Class 2 flows will be zero in drought years and as high as 1,402,800 acre feet in wet years. In 1977, a drought year, the Class 1 supply was only 25% of the 800,000 acre feet.

The lands served by Friant are mostly planted to permanent crops such as trees and vines. All of the lands overly a severely overdrafted groundwater supplies and some have no groundwater supplies at all. Without continuation of delivery of the quantities of water contracted for and delivered for over forty-five years, the lands will become unproductive and barren.

To release flows from Friant to re-establish a Salmon run in the San Joaquin River would take a large portion of the Class 1 supply, as flows would be required every year.

2. THE 1939 CONTRACT.

Madera and Chowchilla are unique from other Friant Unit Contractors in that they are the recipients of the benefits afforded to them under the 1939 Contract between Madera and the United States, a portion of which was assigned to Chowchilla when land in Madera was withdrawn to form Chowchilla.

The 1939 Contract is described in *Madera Irrigation District v. Hancock*, 985 F.2d 1397, 1399 (9th Cir. 1993) as follows:

> "In 1939, Madera Irrigation District sold land and San Joaquin River water rights to the United States. As part of the consideration, the United States promised to build the Friant Dam and the Madera Canal and enter into contracts, when the project was completed, to sell Madera a permanent supply of 270,000 acre feet of water annually. The parties agreed that 'it is not possible at this time to fix a price to be paid by the District for said water, but the United States agrees that the cost of said water to the District shall not exceed charges made to others than the District for the same class of water and service from the said Friant Dam and Reservoir.'
>
> "In 1951 when construction was done, Madera and the government entered into a forty year contract for purchase and sale of water. They agreed upon a 'permanent' supply, but a contract term of forty years. Under the 1951 contract and 'under succeeding contracts the rates to be charged

the District for water service shall not exceed charges made to others than the District for the same class of water and service from Friant Dam and Reservoir.' The 1951 Contract provided that the executory portions of the 1939 contract ... shall remain in full force and effect." [Chowchilla had entered into a similar forty year contract in 1951 covering its share of the 1939 Contract.] [Added]

3. CONTRACT RENEWALS

Prior to the end of the initial forty-year contracts, Chowchilla and Madera were negotiating the renewals thereof. The United States demanded contract terms, which would require additional payment for the water delivered under the first forty-year contracts and gave the Secretary the unilateral right to amend the contracts after an environmental study had been completed. Chowchilla and Madera claiming that these provisions violated their rights, filed an action in declaratory relief which was dismissed by the District Court and affirmed on appeal in *Madera Irrigation District v. Hancock, supra.* While the appeal was pending, Chowchilla's contract was about to expire and in order to continue to get delivery of Project water, the United States required Chowchilla to dismiss its appeal and execute a long term forty year renewal contract with the objectionable provisions in it. Chowchilla complied. Madera continued the appeal and the enactment of the CVPIA prevented Madera from executing a long term renewal contract. Madera is now operating under an interim renewal contract.

Both Chowchilla's long term renewal contract, and Madera's interim renewal contract, recognize their rights of future renewal for their specified quantities of water pursuant to the 1939 Contract at a price no higher than that charged to other Friant Contractors.

Chowchilla executed its forty-year renewal contract on August 30, 1991 prior to the satisfaction of all ESA requirements which may exist, but its contract was not validated until December 15, 1991, after all ESA requirements had been met.

C. THE BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE.

1. 43 U.S.C. § 390uu provides authority to commence an action against the United States involving Reclamation Contracts in the District Court.

IX.
ARGUMENT

A. JOINDER AND ADOPTION BY REFERENCE

Chowchilla and Madera adopt by reference the Appendix to the Petition filed concurrently herewith by Friant Water Users Authority et al. and join therein.

The Argument set forth herein will be limited to Congressional intention in regard to releases of water from Friant Dam for the restoration of the flows in the river below Gravelly Ford to restore a Salmon run and the effect of the Endangered Species Act (ESA) on Chowchilla's renewal contract.

B. UNDER SECTION 8 OF THE 1902 RECLAMATION ACT, STATE LAW APPLIES TO THE APPROPRIATION AND DELIVERY OF WATER UNLESS THAT LAW IS CONTRARY TO CONGRESSIONAL INTENT.

1. THE RELATIONSHIP OF FEDERAL AND STATE LAWS.

In its landmark decision in *California v. United States*, 438 U.S. 645 (1978) this Court confirmed that reclamation of the arid lands of the western states was undertaken in a spirit of "cooperative federalism" that incorporated a "consistent thread of purposeful and continued deference to state water law by Congress." (438 U.S. at 653.) Thus, when Congress adopted the Reclamation Act of 1902, it included Section 8 (43 U.S.C. § 383) which provides that nothing in the Act shall be construed "to interfere with the laws of any state . . . relating to the control, appropriation, use or distribution of water used in irrigation . . . and the Secretary of Interior, in carrying out the

provisions of the Act, shall proceed in conformity with such laws. . . ."

As interpreted by the Supreme Court, the terms of Section 8 are inclusive. However, they are not without limits. In *California v. United States*, this Court held that Section 8 subjected the distribution of reclamation water to state law unless that law is inconsistent with congressional directives. *California v. United States, supra,* 438 U.S. at 674-75; On remand, the 9th Circuit elaborated:

> "We do not think that Section 8 of the 1902 Reclamation Act was intended to require any later Congress to tolerate state laws whose operation would otherwise be curtailed by the Supremacy Clause, nor to require any particular form of clear statement by a later Congress before inconsistent state laws were overridden. Section 8 requires only that state law will apply unless the contrary is intended by Congress; as we stated in *United States v. Tulare Lake Canal Co.*, 677 F.2d 713, 717 (9th Cir. 1982), the Supreme Court decision in *California v. United States* requires 'that the United States follow state water law absent a pre-empting federal statute.'" *U.S. v. State of Cal. State Water Resources,* 694 F.2d 1171, 1176 (9th Cir. 1982). (Emphasis added)

Accordingly, in determining whether a state statute is "inconsistent" with "congressional directives" for purposes of Section 8, the 9th Circuit turned to the cases deciding whether state regulation is preempted under the Supremacy Clause by congressional action. (694 F.2d at 1176.) These cases hold that "[a] statute or regulation is preempted by a federal rule 'to the extent it conflicts with a federal statute,' or where it 'stands as an obstacle to the full accomplishment and execution of the full proposes and

objectives of Congress.'" *U.S. v. State of Cal, State Water Resources, supra,* 694 F.2d at 1177. Thus, in the reclamation context, the 9th Circuit determined:

> "[A] state limitation or condition on the federal management or control of a federally financed water project is valid unless it clashes with express or clearly implied congressional intent or works at cross-purposes with an important federal interest served by the congressional scheme." Id. (Emphasis added)

C. THE ADOPTION OF CVPIA § 3406(c) WAS A MANIFESTATION OF PRIOR CONGRESSIONAL INTENT THAT THE RIVER BETWEEN GRAVELLY FORD AND MENDOTA POOL REMAIN DRY.

1. THE ISSUE.

We now turn to see whether there has been an express or clearly implied congressional intent which abrogates the application of California Fish & Game Code §5937 or whether §5937 works at cross-purposes with an important federal interest served by the congressional scheme.

§ 5937 in relevant part provides:

> **"The owner of any dam shall allow sufficient water at all times to pass through a fishway, or in the absence of a fishway, allow sufficient water to pass over, around or through the dam, to keep in good condition any fish that may be planted or exist below the dam."**

Section 3406(c) of the Central Valley Project Improvement Act (CVPIA) prohibits the Secretary from

making releases for fish restoration from Friant Dam without a further act of Congress.

The 9th Circuit affirmed the District Court's holding that the CVPIA did not contain a facial preemption of the application of § 5937 to releases by the Secretary from Friant Dam.

2. CONGRESSIONAL INTENT PRIOR TO THE ADOPTION OF CVPIA

Prior to the adoption of a new project by Congress, the Secretary of Interior is required to make a report to the President who sends it to Congress regarding the feasibility of the Project. Secretary Ickes on November 26, 1935 sent his finding of feasibility to President Roosevelt who approved it and sent it to Congress on December 2, 1935. This report upon which Congress authorized the Project stated in regard to Friant Dam:

> "The supply for the San Joaquin Valley will be conveyed up the San Joaquin River through a series of pumping plants and intervening natural and artificial channels a distance of 150 miles lifting the water to an elevation of 160 feet above sea level. (Mendota Pool) This water will replace San Joaquin River water now used for irrigation in the northern San Joaquin Valley, thus permitting the entire flow of the San Joaquin River to be regulated at Friant Reservoir--the second storage unit of the project to be utilized in the southern San Joaquin Valley where local supplies are deficient. Water from this reservoir will be delivered by gravity through conduits extending northerly and southerly to serve developed irrigated lands in an area extending

from Madera County on the north to Kern County on the south." (Emphasis added)

Thus at the very outset of the Project, Congress was informed that the "entire flow of the San Joaquin River would be regulated at Friant Reservoir" to supply the northerly and southerly canals.

Congressional intent regarding a Project, unless specifically set forth by Congress, is determined by this Court. On three separate occasions this Court has clearly determined that Congressional intent was that the San Joaquin River between Gravelly Ford and Mendota Pool would be dry.

The first of these is *United States v. Gerlach Live Stock Company* 339 U.S. 725, 94 L Ed 1231 (1950) It was made clear how the Project was to be operated. The Court stated at 229 US 729:

> **"A more dramatic feature of the plan is the water storage and irrigation system at the other end of the valley. There the waters of the San Joaquin will be arrested at Friant, where they would take leave of the mountains, and will be diverted north and south through a system of canals and sold to irrigate more than a million acres of land, some as far as 160 miles away. A cost of refreshing this great expanse of semiarid land is that, except for occasional spills, only a dry river bed will cross the plain below the dam." (Emphasis added)**

At page 730:

> **"Except at rare intervals there will be no spill over Friant Dam, the bed of the San Joaquin River along**

claimants' lands will be parched and their grass lands will be barren"

The Court did not make its pronouncements in a vacuum, it was based on Congressional intent. In speaking about Congressional intent, the Court stated at 740:

> **"...we have observed that the plan as originally adopted and as carried out by the Bureau included replacement at great expense of all water formerly used for crops and 'controlled grass lands' and purchase of that used on marginal pasture lands. It has consistently advised the Congress that it was purchasing San Joaquin water rights and appropriations have been made accordingly."**

At page 735:

> **"The original plan called for the purchase of water rights and included an estimate of their cost. ... Such has specifically been the Bureau's practice in connection with the Friant Project, and this has been reported to Congress, which has responded nine times in the past twelve years to requests for appropriations to meet such expenses. We think that this amounts, not to authorizations and declarations creating causes of action against the United States, but an awareness and approval of administrative construction."**

At page 732:

> **"A finding of feasibility, as required by law [as a prerequisite to Congressional authorization] was made by the Secretary of Interior on November 26, 1935 . . . was approved by the President on December 2, 1935."**

The Court in *Gerlach* speaks of the information on the Friant project given to Congress in appropriations for the CVP. In footnote [9] on page 735, the Court lists 15 Congressional Hearings in which the Project was described and at page 735 states:

> **"Such has specifically been the Bureau's practice in connection with the Friant project, and this has been reported to Congress,[9] which has responded some nine times in the past twelve years to requests for appropriation to meet such expenditures. We think this amounts, not to authorizations and declarations creating causes of action against the United States, but to awareness and approval of administrative construction."**

The second case involving Congressional intent in the operation of Friant Dam is *Ivanhoe Irrigation District v. McCracken,* 357 US 275, 78 S Ct 1174, 2 L Ed 2d 1313 (1950). Again this was a case involving Congressional intent in relation to the CVP and the application of Congressional directives as against state law. The Court stated in relation to Friant Dam at page 357 US 282:

> **"The water is pumped from the Delta to the canal along the foothills of the Coast Range and by gravity it runs to the pool at Mendota. This exchange of water replaces that diverted from the San Joaquin by the dam at Friant. This latter dam forces the entire flow of the San Joaquin into Millerton Lake which has a capacity of 520,000 acre feet of water. It is diverted from the lake by the Madera Canal to the north and the Friant-Kern Canal to the south. (Emphasis added)**

Next in line is *Dugan v. Rank,* 372 US 609, 83 S Ct 999, 10 L Ed 2d 15, (1963) which involved the San Joaquin River between Friant Dam and Gravelly Ford where, under project operation, a live stream was to be maintained because the riparian use in that area was for irrigated crops, not uncontrolled grasslands, but the River would be dry below Gravelly Ford to Mendota Pool. The trial court in *Dugan* had issued an injunction against the United States and the federal officials operating the project to either install a series of 10 dams in the river between Friant Dam and Gravelly Ford or release the entire natural flow of the river through Friant Dam. *Rank v. Krug* 142 F Supp 1. [It is noted that District Court Judgment provided that the last dam was to be placed immediately below Gravelly Ford and only 5 second feet of flow was required to be released which would result in a dry river bed between just below the dam and Mendota Pool.] The Court of Appeals dismissed the judgment against the United States, but allowed it to stand against the federal officials. *California v. Rank,* 293 F2d 340 and 307 F2d 96. The Supreme Court reversed the entire judgment.

At 372 US 620-21:

> "As the Court of Appeals found, the Project 'could not operate without impairing, to some degree, the full natural flow of the river.' Experience of over a decade along the stretch of the San Joaquin involved here indicates clearly that the impairment was most substantial--almost three-fourths of the natural flow of the river. To require the full natural flow of the river to go through the dam would force the abandonment of this portion of a project which has not only been fully authorized by Congress but paid for through its continuing appropriations. Moreover, it would prevent the fulfillment of the contracts made by the United States with the Water and Utility Districts which are petitioning in No. 115. The Gov-

> ernment would, indeed, be 'stopped in its tracks' . . . (Emphasis added)
>
> "Moreover, the decree would require the United States--contrary to the mandate of Congress--to dispose of valuable irrigation water and deprive it of the full use and control of its reclamation facilities." (Emphasis added)

In footnote [7] at 372 US 271 the Court refers to the Secretary's announced plan of operation of maintaining a live stream only between Friant and Gravelly Ford and adds:

> "Parenthetically, we note that petitioners, in their brief at p. 12, inform us that 'Friant Dam has since been operated in accordance with the Secretary's stated plan, subject to adjustments required by weather and other conditions.'"

These cases establish that Congressional intent prior to the passage of CVPIA was that Friant Dam be operated in such manner as to divert all of the flows of the San Joaquin into Madera and Friant Kern Canals, except those releases to meet the water rights of landowners on the river between the Dam and Gravelly Ford. Between Gravelly Ford and Mendota Pool, except for occasional flood releases, the River would be dry. The Project has been operated in this manner for over 50 years. This Congressional intent does not tolerate the imposition of §5937 to re-establish a Salmon run in a River that Congress determined should be dry.

3. THE CVPIA CARRIED FORWARD THE PRIOR CONGRESSIONAL INTENT IN THE FORM OF A CONGRESSIONAL DIRECTIVE.

As previously described, when Congress authorized the Friant Unit, it set forth its intent that the Project regulate the entire flow of the San Joaquin River so that the River between Gravelly Ford and Mendota Pool would be dry. Nearly 60 years later, when it adopted the CVPIA, Congress transformed this intent into a Congressional directive.

For the most part, when it crafted the CVPIA, Congress wrote broadly. Thus, for example, in describing the purposes of the Act, Congress stated them to be:

> **"(a) to protect, restore, and enhance fish, wildlife, and associated habitats in the Central Valley . . . basin of California;**
>
> **"(b) to address impacts of the Central Valley Project on fish, wildlife and associated habitats;**
>
> **...**
>
> **"(f) to achieve a reasonable balance among competing demands for use of Central Valley Project water, including the requirements of fish and wildlife. . . ." CVPIA § 3402 (106 Stat. 4706).**

Similarly, when Congress identified the fish and wildlife restoration activities it desired the Government to undertake to achieve the purposes of the Act, it wrote inclusively. Thus, Congress set forth some 23 separate activities ranging from the dedication of CVP yield for fish restoration purposes to the installation of a temperature control device at Shasta Dam. CVPIA § 3406(b); 106 Stat. 4714-21.

When it came to the protection and enhancement of fishery resources on the San Joaquin River, however, Congress took a different approach. Thus, although it directed the Secretary of Interior to develop a program to double the natural production of anadromous fish in Central Valley rivers by providing "flows of suitable quality, quantity and

timing to protect all life stages of anadromous fish" (§ 3406(b)(1), it specifically excluded the San Joaquin River from the program:

> **"The Secretary . . . is further authorized and directed to:**
> **(1) develop within three years of enactment and implement a program which makes all reasonable efforts to ensure that, by the year 2002, natural production of anadromous fish in Central Valley rivers and streams will be sustainable, on a long-term basis, at levels not less than twice the average levels attained during the period 1967-1991; Provided, that this goal shall not apply to the San Joaquin River between Friant Dam and the Mendota Pool, for which a separate program is authorized under subsection 3406(c) of this title . . ." CVPIA § 3406(b)(1); 106 Stat. 4714, emphasis added.**

Rather than include the San Joaquin in a fish doubling program to be achieved through the provision of in-stream flows, Congress instead, directed the Secretary to develop a "comprehensive plan" to address fish and wildlife concerns on the River. It also required that the plan adhere to a "reasonable, prudent and feasible" standard found nowhere else in the Act:

> **"The Secretary shall, by not later than September 30, 1996:**
> **(1) develop a comprehensive plan, which is reasonable, prudent and feasible, to address fish, wildlife and habitat concerns on the San Joaquin River, including but not limited to the stream flow, channel, riparian habitat and water quality improvements that would be needed to reestablish where necessary and to sustain naturally reproducing anadromous fisheries from Friant Dam to its confluence with the**

San Francisco Bay/Sacramento-San Joaquin Delta Estuary." CVPIA § 3406(c); 106 Stat. 4721.

Congress was also explicit about the release of flow from Friant Dam prior to the implementation of such a "comprehensive plan." Until such implementation is authorized by Congress, the Secretary is barred from making releases for the restoration of flows to the lower San Joaquin River absent a further act of Congress:

> "During the term that the Secretary is developing the plan provided for in this subsection, and until such time as Congress has authorized the Secretary to implement such plan, with or without modifications, the Secretary shall not, as a measure to implement this title, make releases for the restoration of flows between Gravelly Ford and the Mendota Pool and shall not thereafter make such releases as a measure to implement this title without a specific Act of Congress authorizing such releases." Id.

Rather than requiring the release of Friant Unit water for fishery purposes, Congress instead, provided for the payment of in-lieu monetary surcharges by the Friant Intervenors. Id.

It is difficult to find a clearer statement of "an important federal interest served by the congressional scheme" than that set forth in § 3406(c).

NRDC's attempted application of § 5937 to compel the release of water from Friant Dam is inconsistent with the approach laid out in the CVPIA. Unlike Congress' proposed comprehensive plan, to be approved by Congress, § 5937 is not governed by standards of reasonableness, prudence or feasibility. Instead, the guiding standard is simply the release of "sufficient water" to maintain fish below a

dam in good condition. Moreover, while the CVPIA requires the decision about further releases from Friant to be made by Congress, the recommendation of what water is "sufficient" under § 5937 is made, not by Congress, but by California's Department of Fish and Game, the State Water Resources Board, or the Courts applying state law. Finally, while Congress established a program of in-lieu surcharges to be paid by the Friant Intervenors, nothing in § 5937 provides for the payment of a surcharge in lieu of "sufficient water."

The Circuit Court in interpreting the CVPIA and determined that:

> **"The CVPIA provides that Friant dam water is not to be released from the Friant Dam to comply with provisions of the CVPIA regarding the development of a plan to reestablish fish below the dam.**
>
> **"There is no clear directive in the CVPIA that preempts application of §5937 if the state law could be implemented in a way that is consistent with Congress' plan to develop and restore fisheries below Friant dam in a manner that is 'reasonable, prudent and feasible.'" (Emphasis added)**

The Court failed to consider that the prohibition of release of water to reestablish a salmon run as set forth in the CVPIA was a continuation of a long standing Congressional intent that the river below Gravelley Ford to Mendota Pool would be dry.

As Congress has not as yet adopted a plan of restoration that is "reasonable, prudent and feasible" and, by Congressional Act, directing releases by the Secretary, how can §5937 be implemented in a way that is consistent with a plan approved by Congress, when no such plan exists? Congress has reserved to itself the right to adopt a plan if it is reason-

able, prudent and feasible. It has not delegated that power to any agency of the State.

The Secretary cannot dance to two drummers. The 9th Circuit failed to consider that releases from Friant Dam for fish restoration can only be governed by either State direction to the Secretary under § 5937 or Congressional direction pursuant to the CVPIA, and any restoration plan that might be developed thereunder. Releases cannot be governed by both. If Congress says, "leave the river dry until we act otherwise" and the State says, "re-establish the flows" whose edict does the Secretary follow? The answer lies in the express mandates of congressional intent and the Supremacy Clause of the Constitution.

The Circuit Court attempted to avoid such an obvious conflict by noting that Congress had prohibited the Secretary from releasing water from Friant for the restoration of flows only "as a measure to implement this title." It then stated:

> "The plain meaning of the statute is that the restoration only applies to those releases required under the CVP Improvement Act. By implication, therefore, other releases, such as those mandated by section 5937, are permitted."

When Congress linked the prohibition of Friant releases to the implementation of "this title," it did not write narrowly as suggested by the Circuit Court. To the contrary, the purposes of "this title" were described by Congress in the broadest possible terms with respect to fish and wildlife. CVPIA § 3402, 106 Stat. 4706. Thus, when Congress barred releases from Friant absent a further Act of Congress, it did so with respect to "this title's" broad purpose of protecting, restoring and enhancing fish and wild-

life habitats in the Central Valley (§ 3402(a)) and its equally broad purpose of addressing impacts of the CVP on fish (§ 3402(b)).

In summary, there is facial preemption in the CVPIA of the application of §5937 to releases from Friant Dam. The long standing Congressional intent that the River remain dry between Gravelly Ford and Mendota Pool is now manifested as a Congressional Directive in the CVPIA.

D. THE 1939 CONTRACT CREATED VESTED RIGHTS OF RENEWAL FOR A SPECIFIED QUANTITY OF WATER WHICH PRECLUDED SECTION 7 CONSULTATION.

1. MADERA AND CHOWCHILLA'S VESTED RIGHTS

While the decision in *Madera Irrigation District v. Hancock, supra,* sustained the trial court's judgment of dismissal, it also established that Madera and Chowchilla had vested constitutionally protected rights to a permanent supply of water from the Project by the continuing right of renewal. At 985 F.2d. 1401-1402 the Court stated:

> **"We accept Madera's general proposition that a valid contract right of an irrigation district against the United States is property protected by the Fifth Amendment. *Lynch v. United States*, 292 U.S. 571, 579, 54 S.Ct. 840, 843, 78 L.Ed. 1434 (1934); See *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003, 104 S.Ct. 2862, 2873, 81 L.Ed.2d 815 (1984). Rights against the United States arising out of a contract are property rights protected from deprivation or impairment by the Fifth Amendment. *Barcellos and Wolfsen, Inc. v. Westlands Water District*, 899 F.2d 814, 821 (9th Cir. 1990). The Due Process Clause**

limits the exercise of sovereign power which would impair obligations under government contracts." *Alpine Ridge Group v. Kemp*, 955 F.2d 1382, 1387 (9th Cir.), *cert. granted*, ___U.S ___ 113 S.Ct. 490, 121 L.Ed.2d 429 (1992). To demonstrate a wrongful taking or impairment, Madera must establish that it has cognizable property rights arising out of its contracts with the government and that the government has abrogated its contractual rights.

"A. Right to Renewal.

The government offers a broad justification for the operation and maintenance charges and all the other changes at issue which we cannot accept. It urges that Madera had no renewal right under the contract, so the government was free to offer renewal on any terms. We cannot reconcile that with the terms of the 1939 Contract and 1951 contracts. Madera did not exchange its land and its water rights for a forty year supply of water. It exchanged them, as its 1951 contract recites, for a 'permanent' supply of water. Section 4 of the 1951 contract expressly provided for renewal at the expiration of the forty year term and terms for the 'succeeding contracts': . . . (Emphasis added)

"This provision guarantees Madera certain rights after the expiration of the 1951 contract. It has a vested property right to a permanent water supply based on express provisions of its contracts. *Cf. Alpine Ridge Group v. Kemp*, 955 F.2d 1382, 1385-86 (9th Cir.1992). (Express provisions of contract supported by independent consideration, not merely legislative provisions, create vested property rights), *cert. granted*, ___U.S. ___113 S.Ct. 490, 121 L.Ed. 2d 429 (1992)."

The Court then went on to hold that neither the contract amendment provision nor the increased price for water violated Madera and Chowchilla's rights under their contracts. In so doing, however, it used the "surrendered in unmistakable terms" test that was abrogated by this Court in *United States v. Winstar Corp.* 116 S Ct 2432 (1996) 135 L Ed 2d 964. As stated at page 997:

> **"Injecting the opportunity for unmistakability litigation into every common contract action would, however produce the untoward result of compromising the Government's practical capacity to make contracts, which we have held to be 'of essence of sovereignty' itself."**

And at page 998:

> **"In any event, we think the dissent goes fundamentally wrong when it concludes that 'the issue of remedy for . . . breach' can arise only 'if the sovereign did surrender its power unequivocally.' . . . This view ignores the other, less remarkable possibility actually found by both courts that construed these contracts that the Government agreed to do something that did not implicate its sovereign powers at all, that is to indemnify its contracting partners against financial losses arising from regulatory change."**

When the United States agreed to furnish Madera, and, by assignment Chowchilla, a specified quantity of water in perpetuity in exchange for the dam site at Friant and Madera's adjudicated rights to the flows of the San Joaquin River, the "Government agreed to do something that did not implicate its sovereign powers." It provided a vested right in Madera and later by assignment to Chowchilla, to continue to receive that supply, protected by the Fifth Amendment.

The rights to a specified quantity of water from Friant in perpetuity were granted by the United States to Madera and Chowchilla by the 1939 Contract in return for the conveyance to the United States of the land constituting the dam site at Friant and an assignment of the adjudicated rights to the flows of the San Joaquin River. While the initial forty year contracts satisfied that right during their term, on the expiration of those contracts Madera and Chowchilla were reinvested with their rights under the 1939 Contract. [See *Madera Irrigation District v. Hancock, supra,* at 985 F.2d 1401.]

2. WHERE A VESTED RIGHT BY CONTRACT WITH THE UNITED STATES HAS ACCRUED PRIOR TO THE ADOPTION OF ESA, SECTION 7 CONSULTATION IS NOT A PREREQUISITE TO FULFILLING THAT RIGHT.

In *Sierra Club v. Babbitt,* 65 F.3d 1502 (9th Cir 1995), prior to the passage of ESA, BLM had granted a road right of way to Seneca for the construction of a road across government land. Seneca started construction after the adoption of ESA and Sierra Club brought an action to enjoin construction claiming a violation of ESA. In discussing whether ESA should be applied retroactively to prohibit the exercise of rights granted prior to its passage, the Court stated at page 1507:

> **"The only issue remaining, therefore, is whether the BLM's failure to consult with the FWS on Seneca's right-of-way construction was a violation of the consultation provisions of section 7."**

At pages 1508-09:

> **"To what extent does Section 7 apply where the BLM granted right-of-way by contract to a private entity before passage of ESA and the agency's continuing ability to influence the private conduct is limited to three factors unrelated to the conservation of the threatened spotted owl.**
>
> **"The regulations supply the answer: 'Section 7 and the requirements of this part apply to all actions in which there is discretionary Federal involvement or control.'"**

At page 1509:

> **". . . the right-of-way was granted prior to the enactment of ESA and there is no further action relevant to the threatened spotted owl that the BLM can take prior to Seneca's exercise of their contractual rights."**

Even without regard to the rights of Madera and Chowchilla under the 1939 Contract, the District Court in its May 30, 1995 Order on summary judgment found as undisputed facts:

> **"Here, it is undisputed that the renewal contracts maintain the status quo as to water service. Deliveries under the new contracts will be for the same quantities and accomplished by the same scope of Friant Unit operations as deliveries under the previous long-term contracts. Accordingly, renewal will maintain the status quo as to the diversion from the San Joaquin River, the scope of agricultural irrigation and the terms of the contractual relationship between the federal and non federal defendants. In this sense, the disputed action accomplishes 'nothing new, nor more extensive, nor other than contemplated'**

when the original water service contracts were executed."

Thus, the activity of the United States, pursuant to the requirements of the 1939 Contract, in executing the original forty year contracts and Chowchilla's forty year renewal contract [all of which stated that they performed the 1939 Contract obligations of the United States during their terms] does not depend on "additional agency action", but "continued agency action" which has been in place since deliveries began under the original forty-year contracts.

The Circuit Court, in its opinion, lumped Madera and Chowchilla's rights with those of Orange Cove and quoted the provisions of the statutory right of renewal contained in 43 U.S.C. § 485h (1) etc. which give discretion to the United States in renewal. It did not consider the vested rights of Madera and Chowchilla under the 1939 contract.

While Madera and Chowchilla, or their landowners, might be subject to a violation of ESA by a taking of endangered species, they were not required to undergo a Section 7 consultation as their contract rights preceded ESA and there was no change in operations under the contracts.

The District Court, in its May 31, 1995 Order, [mooted by the 9th Circuit] guided by the 9th Circuit's decisions in *Upper Snake River Chapter of Trout Unlimited v. Hodel,* 921 F2d 232 (9th Cir. 1990) and *Nat'l Wildlife Fed'n v. Espy,* 45 F3d 1337 (9th Cir. 1995), properly concluded that renewal of Chowchilla's contract did not constitute "agency action" under NEPA. As stated in *Upper Snake River, supra* at page 235:

> **"This circuit has held that where a proposed federal action would not change the status quo, an EIS is not necessary. 'An EIS need not discuss the**

environmental effects of mere continued operation of a facility' (*Burbank, supra*)."

In spite of this determination, the District Court and the 9th Circuit found that the very same maintenance of the status quo constituted "agency action" under ESA and required prior consultation prior to contracting.

This determination is totally contrary to the 9th Circuit's opinion in *Marbled Murrelet v. Babbitt,* 83 F.3d 1068, 1075 (9th Cir 1996):

> **"The standards for 'major federal action' under NEPA and 'agency action' under ESA are much the same. If there is any difference, case law indicates 'major federal action' is the more exclusive standard."**

Under its guaranteed renewal rights under the 1939 Contract, the Chowchilla renewal contract clearly maintains the status quo, and, therefore, there is no "major agency action" under NEPA or "agency action" under ESA. Consultation under Section 7 is not required.

E. CHOWCHILLA'S RENEWAL CONTRACT BECAME EFFECTIVE AFTER COMPLETION OF ALL ESA REQUIRMENTS.

1. THE PRIOR PLEADINGS AND ORDERS.

In all of their pleadings, Plaintiffs had alleged that the contracts had been executed prior to the completion of Section 7 consultation under ESA.

In each of its previous orders, the District Court stated ten times that the controlling date on

the applicability of ESA was the date of execution of the contracts.

2. THE ORANGE COVE CONTRACT AND THE FINAL COURT ORDER.

Orange Cove had executed its contract prior to the listing of the Chinook Salmon and claimed, therefore, that ESA was inapplicable to its contract.

In its Final Order, filed January 16, 1997, the District Court for the first time stated that the effective date of the contracts was after entry of a judgment of validation. This was based on a provision in all of the contracts that the contract would not be binding on the United States until entry of a validation judgment. In this Order the Court stated that no petitions for modification or re-hearing would be allowed.

Chowchilla was not a party to Orange Cove's Motion to Reconsider which was the basis for the Court's Final Order. NRDC for the first time raised the validation issue in its response to Orange Cove's Motion to Reconsider.

In view of the pleadings and the Court's prior determinations that the effective date was the date of execution, Chowchilla had no opportunity to show that its validation judgment was subsequent to the completion of ESA documentation because that was not in issue.

3. CHOWCHILLA'S REQUEST FOR JUDICIAL NOTICE.

Chowchilla filed a request with the 9th Circuit for judicial notice of its validation judgment. The 9th

Circuit denied this request and failed to consider the issue because it had not been raised in the District Court, thus totally ignoring the fact that there was no opportunity to raise the issue before the District Court.

If the date of the validation judgment is the effective date of the contracts, as found by both the District Court and the 9th Circuit, then Chowchilla's contract became effective after all ESA requirements had been fulfilled and is valid.

CONCLUSION

This case involves the continued productivity of approximately one million acres of the most fertile farm lands in the nation. It presents extremely important issues regarding the federal – state relationship in the operation of the largest Reclamation Project in the Nation. For these reasons and those set forth in the other Petitions in this case, it is respectfully submitted that Certiorari should be granted.

Dated: November 27, 1998

GREEN, GREEN & RIGBY

By: Denslow Green

Denslow Green
Attorneys for Petitioners
Chowchilla Water District and
Madera Irrigation District

APPENDIX A.

DECISION OF 9TH CIRCUIT COURT OF APPEALS

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATURAL RESOURCES DEFENSE COUNCIL; TROUT UNLIMITED OF CALIFORNIA; BAY INSTITUTE OF SAN FRANCISCO; CALIFORNIA NATURAL RESOURCES FEDERATION; CALIFORNIA SPORTFISHING PROTECTION ALLIANCE; CALIFORNIA TROUT; FRIENDS OF THE RIVER; NORTHERN CALIFORNIA GUIDES ASSOCIATION; PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS; SAN JOAQUIN RAPTOR RESCUE CENTER; SIERRA CLUB; STANISLAUS AUDUBON SOCIETY, INC.; UNITED ANGLERS OF CALIFORNIA; CALIFORNIA STRIPED BASS ASSOCIATION; NATIONAL AUDUBON SOCIETY,

Plaintiffs-Appellees,

v.

DAVID G. HOUSTON,

Defendant,

and

LOWER TULE RIVER IRRIGATION DISTRICT; PORTERVILLE IRRIGATION DISTRICT; SAUCELITO IRRIGATION DISTRICT; STONE CORRAL IRRIGATION DISTRICT; TEAPOT DOME WATER DISTRICT,

Defendants-Intervenors-Appellants.

No. 97-16030

D.C. No. CV 88-1658 LKK

OPINION

NATURAL RESOURCES DEFENSE COUNCIL; TROUT UNLIMITED OF CALIFORNIA; BAY INSTITUTE OF SAN FRANCISCO; CALIFORNIA NATURAL RESOURCES FEDERATION; CALIFORNIA SPORTFISHING PROTECTION ALLIANCE; CALIFORNIA TROUT; FRIENDS OF THE RIVER; NORTHERN CALIFORNIA GUIDES ASSOCIATION; PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS; SAN JOAQUIN RAPTOR RESCUE CENTER; SIERRA CLUB; STANISLAUS AUDUBON SOCIETY, INC.; UNITED ANGLERS OF CALIFORNIA; CALIFORNIA STRIPED BASS ASSOCIATION; NATIONAL AUDUBON SOCIETY,

Plaintiffs-Appellees,

v.

DAVID G. HOUSTON,

Defendant,

and

ORANGE COVE IRRIGATION DISTRICT; DELANO-EARLIMART IRRIGATION DISTRICT; EXETER IRRIGATION DISTRICT; IVANHOE IRRIGATION DISTRICT; LINDMORE IRRIGATION DISTRICT; LINDSAY-STRATHMORE IRRIGATION DISTRICT; TERRA BELLA IRRIGATION DISTRICT,

Defendants-Intervenors-Appellants.

No. 97-16041

D.C. No.
CV 88-1658 LKK

NATURAL RESOURCES DEFENSE COUNCIL; TROUT UNLIMITED OF CALIFORNIA; BAY INSTITUTE OF SAN FRANCISCO; CALIFORNIA NATURAL RESOURCES FEDERATION; CALIFORNIA SPORTFISHING PROTECTION ALLIANCE; CALIFORNIA TROUT; FRIENDS OF THE RIVER; NORTHERN CALIFORNIA GUIDES ASSOCIATION; PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS; SAN JOAQUIN RAPTOR RESCUE CENTER; SIERRA CLUB; STANISLAUS AUDUBON SOCIETY, INC.; UNITED ANGLERS OF CALIFORNIA; CALIFORNIA STRIPED BASS ASSOCIATION; NATIONAL AUDUBON SOCIETY,

Plaintiffs-Appellees,

v.

DAVID G. HOUSTON,

Defendant,

and

FRIANT WATER USERS AUTHORITY,

Defendant-Appellant.

No. 97-16042

D.C. No.
CV 88-1658 LKK

NATURAL RESOURCES DEFENSE COUNCIL; TROUT UNLIMITED OF CALIFORNIA; BAY INSTITUTE OF SAN FRANCISCO; CALIFORNIA NATURAL RESOURCES FEDERATION; CALIFORNIA SPORTFISHING PROTECTION ALLIANCE; CALIFORNIA TROUT; FRIENDS OF THE RIVER; NORTHERN CALIFORNIA GUIDES ASSOCIATION; PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS; SAN JOAQUIN RAPTOR RESCUE CENTER; SIERRA CLUB; STANISLAUS AUDUBON SOCIETY, INC.; UNITED ANGLERS OF CALIFORNIA; CALIFORNIA STRIPED BASS ASSOCIATION; NATIONAL AUDUBON SOCIETY,

Plaintiffs-Appellees,

v.

DAVID G. HOUSTON,

Defendant,

and

MADERA IRRIGATION DISTRICT; CHOWCHILLA WATER DISTRICT,

Defendants-Intervenors-Appellants.

No. 97-16043

D.C. No. CV 88-1658 LKK

NATURAL RESOURCES DEFENSE COUNCIL; TROUT UNLIMITED OF CALIFORNIA; BAY INSTITUTE OF SAN FRANCISCO; CALIFORNIA NATURAL RESOURCES FEDERATION; CALIFORNIA SPORTFISHING PROTECTION ALLIANCE; CALIFORNIA TROUT; FRIENDS OF THE RIVER; NORTHERN CALIFORNIA GUIDES ASSOCIATION; PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS; SAN JOAQUIN RAPTOR RESCUE CENTER; SIERRA CLUB; STANISLAUS AUDUBON SOCIETY, INC.; UNITED ANGLERS OF CALIFORNIA; CALIFORNIA STRIPED BASS ASSOCIATION; NATIONAL AUDUBON SOCIETY,

Plaintiffs-Appellees,

v.

DAVID G. HOUSTON,

Defendant,

and

ARVIN-EDISON WATER STORAGE DISTRICT; SHAFTER-WASCO IRRIGATION DISTRICT; SOUTHERN SAN JOAQUIN MUNICIPAL UTILITY DISTRICT,

Defendants-Intervenors-Appellants.

No. 97-16044

D.C. No.
CV 88-1658 LKK

NATURAL RESOURCES DEFENSE COUNCIL; TROUT UNLIMITED OF CALIFORNIA; BAY INSTITUTE OF SAN FRANCISCO; CALIFORNIA NATURAL RESOURCES FEDERATION; CALIFORNIA SPORTFISHING PROTECTION ALLIANCE; CALIFORNIA TROUT; FRIENDS OF THE RIVER; NORTHERN CALIFORNIA GUIDES ASSOCIATION; PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS; SAN JOAQUIN RAPTOR RESCUE CENTER; SIERRA CLUB; STANISLAUS AUDUBON SOCIETY, INC.; UNITED ANGLERS OF CALIFORNIA; CALIFORNIA STRIPED BASS ASSOCIATION; NATIONAL AUDUBON SOCIETY,

Plaintiffs-Appellees,

v.

DAVID G. HOUSTON,

Defendant,

and

TULARE IRRIGATION DISTRICT,

Defendant-Intervenor-Appellant.

No. 97-16045

D.C. No.
CV 88-1658 LKK

NATURAL RESOURCES DEFENSE COUNCIL; TROUT UNLIMITED OF CALIFORNIA; BAY INSTITUTE OF SAN FRANCISCO; CALIFORNIA NATURAL RESOURCES FEDERATION; CALIFORNIA SPORTFISHING PROTECTION ALLIANCE; CALIFORNIA TROUT; FRIENDS OF THE RIVER; NORTHERN CALIFORNIA GUIDES ASSOCIATION; PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS; SAN JOAQUIN RAPTOR RESCUE CENTER; SIERRA CLUB; STANISLAUS AUDUBON SOCIETY, INC.; UNITED ANGLERS OF CALIFORNIA; CALIFORNIA STRIPED BASS ASSOCIATION; NATIONAL AUDUBON SOCIETY,

Plaintiffs-Appellants,

v.

ROGER PATTERSON, as Regional Director of the U.S. Bureau of Reclamation; BRUCE BABBITT; FRIANT WATER USERS AUTHORITY,

Defendants-Appellees,

and

LOWER TULE RIVER IRRIGATION DISTRICT; PORTERVILLE IRRIGATION DISTRICT; SAUCELITO IRRIGATION DISTRICT; STONE CORRAL IRRIGATION DISTRICT; TEAPOT DOME WATER DISTRICT,

Defendants-Intervenors-Appellees.

No. 97-16173

D.C. No.
CV 88-1658 LKK

Appeals from the United States District Court
for the Eastern District of California
Lawrence K. Karlton, District Judge, Presiding

Argued and Submitted
December 8, 1997—San Francisco, California

Filed June 24, 1998

Before: Otto R. Skopil, Jr., Dorothy W. Nelson, and
A. Wallace Tashima, Circuit Judges.

Opinion by Judge Tashima

SUMMARY

Environmental Law/Water

The court of appeals affirmed a judgment of the district court in part and reversed in part. The court held that the United States Bureau of Reclamation violates the Endangered Species Act (ESA) by renewing water-supply contracts prior to completing statutorily required consultations with the relevant federal wildlife-conservation agencies.

In the late 1940s, various irrigation and water districts that rely on water from the Friant dam entered into water-service contracts with the federal government. The contracts specified that they would be renewed, on terms to be agreed on, prior to their expiration. In 1956, Congress mandated that contract holders had a right to renewal.

The Bureau of Reclamation determined that contract renewals and recommitment of all the Friant dam's water was not likely to adversely affect winter-run chinook salmon, which was listed as a threatened species. Because the National

Marine Fisheries Service (NMFS) had jurisdiction over the winter-run chinook salmon, the Bureau sought NMFS's concurrence in the Bureau's assessment. In a letter to the Bureau, NMFS disagreed with the Bureau's determination of no adverse impact, but told the Bureau that formal consultation was not required. The Bureau proceeded to execute the water contracts without formal consultation with NMFS.

The Fish and Wildlife Service (FWS) has jurisdiction over several protected species in the Friant dam area. The Bureau consulted informally with FWS. When the Bureau requested formal consultation, FWS issued a "no jeopardy" Biological Opinion. By then, ten of the contracts had been renewed.

The ESA requires federal agencies to consult with relevant wildlife services if the agency determines that its proposed action may affect a threatened or endangered species. Section 7(d) prohibits the irreversible and irretrievable commitment of resources during the consultation process.

By 1992, the Bureau had executed 14 renewal contracts. All of them provided for a 40-year period of water delivery under terms substantially similar to the original contracts. They also contained Article 14, which allowed some contract modification pursuant to environmental review, and all but one contained a provision modifying the terms dependent on the outcome of this litigation.

Appellee Natural Resources Defense Council and other environmental organizations sued the Bureau, alleging that the Bureau violated the Endangered Species Act (ESA) by renewing the water contracts without first preparing an environmental impact statement (EIS); that the Bureau failed to comply with the procedural requirements of the National Environmental Protection Act (NEPA); and violated the Reclamation Act by not complying with California Fish and Game Code § 5937 (requiring dam owners to provide sufficient water to allow passage of fish).

The district court concluded that the contracts amounted to an irreversible and irretrievable commitment of resources, and that all contracts executed prior to completion of the required consultations with FWS and NMFS violated § 7(d) of the ESA. The court denied the plaintiffs' request for an injunction, but ordered the parties to include in the remaining contracts a clause conditioning the terms on the outcome of this case, and concluded that the Bureau could not proceed until FWS found that the contracts were not likely to affect a protected species.

With respect to the claim that the Bureau had violated § 5937, the district court denied the Bureau's motion to dismiss. The court concluded that the Bureau was not exempt from § 5937, and that the Central Valley Project Improvement Act (CVPIA) does not preempt the California statute.

The district court also determined that the FWS Biological Opinion did not moot the procedural ESA violations because its issuance did not provide all the relief that could have been granted. As a remedy, the court concluded that rescission was appropriate and invalidated all the contracts that were executed without ESA consultation.

The irrigation and water districts appealed.

[1] The ESA has explicit substantive goals that are served by its procedural requirements. [2] Judicial review of administrative decisions involving the ESA is governed by the Administrative Procedure Act (APA). A court may set aside an agency action if it was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, or without observance of procedure required by law. [3] The term "agency action" has been defined broadly. Negotiating and executing contracts is "agency action."

[4] The federal reclamation laws state that the government was to renew the contracts on mutually agreeable terms, that

water rights were based on the amount of available water, and that the Secretary of the Interior had discretion to set rates. There was some discretion available to the Bureau during the negotiation process. [5] Even if the original contracts guaranteed a right to available water in the renewal contracts, the Bureau had discretion to alter key terms in the contracts, and might have been able to reduce the amount of water available for sale if necessary to comply with the ESA.

[6] Before initiating action in an area that contains threatened or endangered species or a critical habitat, an agency must make an independent determination of whether its action may affect a protected species or habitat, or initiate a formal consultation with the agency that has jurisdiction over the species. If an agency determines that an action may affect critical species or habitats, formal consultation is mandated. Formal consultation is excused only when an agency determines that its action is unlikely to adversely affect the protected species or habitat, and the relevant service (FWS or NMFS) concurs with the determination.

[7] The issue in this case was whether the Bureau was arbitrary and capricious when it relied on the NMFS's view that a consultation was not necessary, despite NMFS's refusal to provide the required concurrence. By relying on NMFS, the Bureau did not meet its independent responsibilities under the ESA. [8] The Bureau had an affirmative duty to ensure that its actions did not jeopardize endangered species, and the NMFS letter clearly disagreed with the agency's determination of no adverse impact. The district court did not err in concluding that it was arbitrary and capricious for the Bureau to forgo formal consultation with NMFS. All the contracts were subject to rescission.

[9] The Bureau also failed to follow its obligations with respect to its consultation with FWS. [10] An agency should not be permitted to skirt the procedural requirements of § 7(d) by including a catchall savings clause like Article 14 in ille-

gally executed contracts. Even if such a clause could have preserved the contracts, Article 14 was inadequate to serve that purpose because it limited conservation-based modifications to minor adjustments, and prohibited an adjustment in the amount of water delivered. The reasonable and prudent alternative of reallocating water from irrigation to conservation was foreclosed. The district court did not err in concluding that the Bureau violated § 7(d) when it executed the contracts prior to completing formal consultation with FWS.

[11] Procedural violations of the ESA are not necessarily mooted by the FWS finding that a substantive violation of the ESA had not occurred. The process, which was not observed, itself offers valuable protections against the risk of a substantive violation, and ensures that environmental concerns will be factored into the decisionmaking process. Also, due to the procedural violations, the plaintiffs' ability to enjoin the agency action while they challenged the validity of the Biological Opinion was negated.

[12] If the Biological Opinion had been rendered before the contracts were executed, the FWS would have had more flexibility to make, and the Bureau to implement, suggested modifications to the proposed contracts. Even when there is a "no jeopardy" Biological Opinion, the service may make nonbinding conservation recommendations. The failure to respect the process mandated by law cannot be corrected with post-hoc assessments of a "done deal."

[13] When an agency acts arbitrarily or capriciously, or not in accordance with the law, the APA states that the court shall set aside the agency action. While the district court had discretion to preserve the contracts if the procedural flaw could have been rectified in another way, there was no reason to compel that result in this case. [14] An injunction would not have served any purpose if the contracts were not invalidated. The district court's decision to rescind the contracts was not an abuse of discretion.

[15] NEPA requires all federal agencies to consider the environmental consequences of all major federal actions significantly affecting the quality of the human environment by preparing an EIS before undertaking the action. Instead of preparing an EIS, an agency may make a determination that an EIS is unnecessary by conducting an environmental assessment (EA) and issuing a finding of no significant impact on the environment.

[16] The Bureau did not prepare an EA or an EIS. The CVPIA requires the government to complete an EIS before it may enter into any subsequent Friant renewal contracts. When intervening legislative changes settle a controversy, the action may be moot. The NEPA issue was mooted by the remedy of contract rescission and CVPIA's requirement that an EIS be completed on the dam before reexamination of the contracts.

[17] A case is generally considered ripe if the relevant issues are sufficiently focused to permit judicial resolution without further factual development, and the parties would suffer a hardship by the postponement of judicial action. When the Bureau is not complying with § 5937, and its obligation to comply is in dispute, determination of a § 5937 issue is ripe. Rescission of the 14 contracts was unrelated to the timeliness of the § 5937 claim, which was directed to the Bureau, whose duty to comply with state law exists independent of any contractual arrangements.

[18] The CVPIA provides that Friant dam water is not to be released to comply with provisions of the statute regarding the development of a plan to reestablish fish below the dam. There is no clear directive in the CVPIA that preempts application of § 5937 if the state law can be implemented in a way that is consistent with Congress' plan to develop and restore fisheries below the dam.

[19] The district court never ruled that § 5837 applied to the Friant dam. There were other issues that the district court

did not address. These issues had to be remanded for a determination on the merits.

COUNSEL

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OPINION

TASHIMA, Circuit Judge:

Various irrigation and water districts (Non-federal Defendants), that rely on water from the Friant dam, appeal the district court's summary judgment decision that the Bureau of Reclamation (Bureau or Federal Defendant), violated the Endangered Species Act (ESA) by renewing water contracts prior to completing required endangered species consultations. These defendants also appeal the district court's conclusion that Section 8 of the Reclamation Act, 43 U.S.C. § 383, mandates compliance with Section 5937 of the California Fish and Game Code. Various environmental groups led by the National Resources Defense Council (Plaintiffs), cross-appeal the district court's summary judgment decision that the Bureau was not required to comply with National Environmental Policy Act (NEPA) and appeal the dismissal of the Section 8/Section 5937 claim as unripe.

We affirm the district court's holding that the ESA was violated and its decision to rescind the contracts at issue. We remand for a determination on the Section 8/Section 5937 claim.

BACKGROUND

The Central Valley Project (CVP) is a multi-unit reclamation project administered by the Bureau. The Friant dam unit of the CVP was built on the San Joaquin River by the Bureau in the 1940s. Prior to construction of the dam, the San Joaquin River met the Sacramento River at the Sacramento-San Joaquin Delta, where they then flowed out to the Pacific Ocean.

Since the time that the dam was completed, the Friant unit has impounded the San Joaquin River water behind the Friant dam and diverted the water to surrounding irrigation districts. This impoundment and diversion leaves a dry stretch of San Joaquin riverbed.

In the late 1940s, the Non-federal Defendants[1] entered into 40-year Friant water service contracts with the government, pursuant to Section 9(e) of the Reclamation Act of 1939, 43 U.S.C. § 485h(e). The contracts typically provided that they would be renewed no later than one year prior to expiration on terms that "shall be agreed upon." In 1956, Congress mandated that contract holders had a right to renewal "under stated terms and conditions mutually agreeable to the parties." 43 U.S.C. § 485h-1(1). Contract holders had "a first right . . . to a stated share or quantity of the project's available water supply . . . ." 43 U.S.C. § 485h-1(4).

The first of these contracts, the contract with the Orange Cove Irrigation District (Orange Cove), expired in February of 1989. The Bureau began contract renewal negotiations with Orange Cove in June, 1988, and executed a renewal contract in May, 1989. By 1992, the Bureau had executed 13 additional water contracts. All 14 contracts provided for water delivery for a 40-year period under terms substantially similar to those in the previous contracts.

In 1992, Congress enacted the Central Valley Project Improvement Act (CVPIA), Pub. L. No. 102-575, § 3401 et seq., 1992 U.S.C.C.A.N. (106 Stat.) 4600, 4706, which required the government to perform an environmental impact statement (EIS) on the Friant unit before it could execute the remaining renewal contracts. The CVPIA also limited the length of subsequently renewed contracts to 25 years. There-

[1]All of the Non-federal Defendants, except for the Friant Water Users Authority, have water service arrangements with the Bureau.

fore, of the 28 Friant water service contracts that were up for renewal, only the first 14 contracts are at issue.

Prior to construction of the Friant dam, the San Joaquin River supported a variety of fish species, including the chinook salmon. The annual spring floods also fed the surrounding wetlands with fresh water. After the Friant dam was built, the San Joaquin River terminated at the dam, and water from the Sacramento-San Joaquin Delta is exported upstream to water users below the dam through a process of pumping and reverse flows. This situation has adversely affected both wetlands and river fish, including the winter-run chinook salmon. The salmon, which was listed as threatened in August, 1989, and is now endangered, is under the protective jurisdiction of the National Marine Fisheries Service (NMFS). Other listed species under the jurisdiction of the Fish and Wildlife Service (FWS) are also located in the Friant Service Area.

The Plaintiffs filed this action against the Bureau in December, 1988, claiming that the Bureau violated NEPA by renewing the water contracts without first performing an EIS. The Plaintiffs sought a preliminary injunction against further contracts. The district court denied the injunction, but ordered the parties to include in the remaining contracts a clause that conditioned the terms on the final outcome of this case. All the renewal contracts in this case, except for the Orange Cove contract, contain this provision. The contracts also include a clause, entitled "Compliance with Reclamation Laws," which permits minor modifications to the contracts in order to comply with federal law. This clause is known as Article 14.

The Plaintiffs' amended complaint also alleges violations of the ESA, section 8 of the Reclamation Act (§ 8), and section 5937 of the California Fish & Game Code (§ 5937). The Non-federal Defendants were permitted to intervene in 1989.

There are five district court orders that are now at issue:

(1) Order filed April 30, 1992. The district court denied the Defendants' motion to dismiss the § 8/§ 5937 claim. *See* 791 F. Supp. 1425 (E.D. Cal. 1992).

(2) Order filed October 12, 1993. The district court denied the Defendants' motion to dismiss the § 8/§ 5937 claim as mooted or preempted by the CVPIA.

(3) Order filed May 31, 1995. The district court granted the Defendants summary judgment on the NEPA claim, but granted the Plaintiffs summary judgment on the ESA claim.

(4) Order filed January 16, 1997. The district court ordered the 14 contracts rescinded. The court concluded that the § 8/§ 5937 claim was not ripe.

(5) Order filed April 16, 1997. The district court amended the January 16, 1997, judgment and dismissed the Plaintiffs' substantive ESA claim without prejudice.

The Non-federal Defendants argue that: (1) the ESA did not apply to their contracts; (2) but if it did, the ESA was not violated; (3) but if the ESA was violated, the claim is moot; (4) but if there was an ESA violation that was not mooted, the remedy of contract invalidation was inappropriate. The Non-federal Defendants also argue that the CVPIA preempts § 5937. The Plaintiffs cross-appeal the grant of summary judgment to the Defendants on the NEPA claim and they appeal the court's conclusion that the § 8/§ 5937 claim was not ripe. The Bureau is participating in the Plaintiffs' cross-appeal only.[2]

[2]The Bureau does not challenge the district court's determination that there was an ESA violation or the remedy of contract rescission.

DISCUSSION

I. Endangered Species Act

A. Overview

Section 7(a)(2) of the ESA requires all federal agencies "to insure that any action authorized, funded, or carried out by such agency is not likely to jeopardize the continued existence" of any endangered or threatened species or result in the destruction of critical habitats. 16 U.S.C. § 1536(a)(2). If an agency determines that its proposed action "may affect" an endangered or threatened species, the agency must formally consult with the relevant Service, the FWS and/or the NMFS, depending on the species that are protected in the area of the proposed action. *See Pacific Rivers Council v. Thomas,* 30 F.3d 1050, 1054 n.8 (9th Cir. 1995). After the formal consultation is completed, the relevant Service will issue a Biological Opinion evaluating the nature and extent of effect on the threatened or endangered species. If the Biological Opinion concludes that the proposed action is likely to jeopardize a protected species, the agency must modify its proposal. Section 7(d) of the ESA prohibits the "irreversible or irretrievable commitment of resources" during the consultation process. 16 U.S.C. § 1536(d).

[1] As the district court observed, the ESA has "explicit substantive goal[s] which [are] served by its procedural requirements." Order of May 31, 1995 at 20 (citing *Thomas v. Peterson,* 753 F.2d 754, 763 (9th Cir. 1985)). The district court concluded that the contracts amounted to an "irreversible and irretrievable commitment of resources" and all contracts executed prior to completion of the required consultations with the FWS and the NMFS violated § 7(d). The district court invalidated all of the contracts which had been executed prior to the completion of the required consultations.

[2] Judicial review of administrative decisions involving the ESA is governed by section 706 of the Administrative

Procedure Act, 5 U.S.C. § 706. A court may set aside an agency action if it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or if it was found to be "without observance of procedure required by law." 5 U.S.C. § 706(2)(A),(D); *Pyramid Lake Paiute Tribe of Indians v. United States Dep't of the Navy,* 898 F.2d 1410, 1414 (9th Cir. 1990). The district court's summary judgment decision is reviewed de novo. *Forsyth v. Humana, Inc.,* 114 F.3d 1467, 1474 (9th Cir.), *cert. denied,* 118 S. Ct. 559 (1997).

B. Applicability of the ESA

[3] As a threshold question, the Non-federal Defendants argue that the ESA did not apply to the contract renewals because the renewals were not "agency action." *See* 16 U.S.C. § 1536(a)(2). This argument must fail. The term "agency action" has been defined broadly. In *TVA v. Hill,* 437 U.S. 153 (1978), the Court stated:

> One would be hard pressed to find a statutory provision whose terms were any plainer than those in § 7 of the Endangered Species Act. Its very words affirmatively command all federal agencies "to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence" of an endangered species or "result in the destruction or modification of habitat of such species. . . ." This language admits of no exception.

Id. at 173. *See also Pacific Rivers,* 30 F.3d at 1055 ("Following the Supreme Court's lead in *TVA,* we have construed 'agency action' broadly.") The regulation defining agency action states:

> Action means all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies. . . . Examples include, but

> are not limited to: . . . the granting of licenses, contracts, leases, easements, rights-of-way, permits or grants in aid.

50 C.F.R. § 402.02. Clearly, negotiating and executing contracts is "agency action."

[4] Orange Cove, the Madera Irrigation District (Madera) and Chowchilla Water District (Chowchilla) contend that the Bureau had no discretion to alter the terms of the renewal contracts, particularly the quantity of water delivered.[3] Where there is no agency discretion to act, the ESA does not apply. *Sierra Club v. Babbitt,* 65 F.3d 1502, 1509 (9th Cir. 1995). The federal reclamation laws, which provided the right to renewal, state that the government is to renew the contracts on "mutually agreeable" terms, 43 U.S.C. § 485h-1(1), that water rights are based on the amount of available project water, 43 U.S.C. § 485h-1(4), and that the Secretary of the Interior (Secretary) has the discretion to set rates to cover an appropriate share of the operation and maintenance costs, 43 U.S.C. § 485h(e). Clearly, there was some discretion available to the Bureau during the negotiation process.

[5] Orange Cove points to the opinion of the Solicitor of the Interior that the Bureau had no discretion for purposes of a NEPA analysis. Orange Cove argues that this opinion was entitled to deference. The opinion, however, only addresses the applicability of NEPA, not the ESA. Even if this opinion were relevant, the district court correctly concluded that the Solicitor's opinion was inconsistent with the requirements of the ESA. First, the opinion began from the premise that the government did not intend to make any substantial changes in the renewal contracts. The Solicitor, however, *did not* conclude that there was no discretion to change the terms of the contracts. He wrote:

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[3]This issue was raised for the first time on a motion for reconsideration which the district court addressed in its Jan. 16, 1997, Order.

> If the Secretary exercises his discretion to make other substantial changes in the contracts at the time of renewal, then analysis must be undertaken to determine whether the exercise of discretion qualifies for a categorical exclusion from preparation analysis under NEPA. . . . [While there is no discretion to alter the quantity of water received . . . the] Secretary has considerable discretion, however, to change other terms of the renewed contracts.

The Solicitor concluded that there was no discretion to change the quantity of water delivered under the contracts because the districts have "a first right . . . to a stated share or quantity of the project's available water supply. . . ." (Citing 43 U.S.C. § 485h-1(4)). The Solicitor, however, assumed that the "project's *available* water supply" included all of the Friant dam water, and he did not address the issue of whether the total amount of available project water could be reduced in order to comply with the ESA or state law. *See O'Neill v. United States*, 50 F.3d 677, 686 (9th Cir. 1995) (noting that an agency can deliver less than a contractually agreed upon amount of water in order to comply with subsequently enacted federal law). Therefore, even if the original contracts guaranteed the Non-federal Defendants a right to a similar share of available water in the renewal contracts, the Bureau had discretion to alter other key terms in the contract, and the Bureau may be able to reduce the amount of water available for sale if necessary to comply with ESA.

C. Procedural Violations of the ESA

1. Failure to Consult with the NMFS

[6] Before initiating any agency action in an area that contains threatened or endangered species or a critical habitat, the agency must (1) make an independent determination of whether its action "may affect" a protected species or habitat, or (2) initiate a formal consultation with the agency that has

jurisdiction over the species. *See generally Peterson,* 753 F.2d at 763. If an agency determines that an action "may affect" critical species or habitats, formal consultation is mandated. *Id.*; 50 C.F.R. § 402.14(a). Formal consultation is excused only where (1) an agency determines that its action is unlikely to adversely affect the protected species or habitat, *and* (2) the relevant Service (FWS or NMFS) concurs with that determination. 50 C.F.R. § 402.14(b); *see Pacific Rivers,* 30 F.3d at 1054, n.8.

The NMFS has jurisdiction over the winter-run chinook salmon, which was listed as a threatened species prior to execution of all but one of the water contracts. The Bureau independently determined that the renewal contracts and recommitment of all the Friant dam's water were not likely adversely to affect the salmon. The Bureau then sought the NMFS' concurrence with that assessment. On November 1, 1991, the Director of the NMFS refused to concur in the Bureau's opinion that the salmon would not be adversely affected. However, the NMFS also stated that formal consultation was not required. The Director wrote:

> While we disagree with the Bureau's determination that renewal of the Friant contracts are not likely to affect the winter-run [chinook salmon] adversely . . . we do not believe that a formal consultation on the Friant contract renewals is necessary. . . . [T]he issue of delta exports is being addressed in our ongoing consultation on the CVP. . . and we believe this will allow us to address the adverse impacts from the activities interrelated to the renewal of the Friant contracts.

The Bureau then proceeded to execute the water contracts without requesting a formal consultation with the NMFS. The Bureau argued that it reasonably relied on the NMFS' determination that a formal consultation was unnecessary.

[7] The Non-federal Defendants cite *Stop H-3 Ass'n v. Dole*, 740 F.2d 1442 (9th Cir. 1984), and *Pyramid Lake*, 898 F.2d 1410, to support their argument that the Bureau's reliance on the NMFS opinion was not arbitrary and capricious. These cases, however, do not support the Non-federal Defendants' position. Unlike both *Stop H-3* and *Pyramid Lake*, the issue in this case is not whether the Bureau was arbitrary and capricious in relying on a properly issued Biological Opinion. Instead, the issue is whether the Bureau was arbitrary and capricious when it relied on the NMFS' view that a consultation was not necessary, despite NMFS' refusal to provide the required concurrence. By relying on the NMFS in this case, the Bureau did not meet its independent responsibilities under the ESA.

[8] The Bureau had an affirmative duty to ensure that its actions did not jeopardize endangered species, and the NMFS letter clearly disagreed with the agency's determination of no adverse impact. *See* 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14. Under those circumstances, regardless of the NMFS position that a formal consultation was "unnecessary," the Bureau had a clear legal obligation to at least request a formal consultation. *See* 50 C.F.R. §§ 402.13, 402.14. The reason that the NMFS gave for stating that a consultation was unnecessary was not supported by statute or regulation and had no rational relationship to the Bureau's independent obligations to ensure that its proposed actions were not likely adversely to affect the salmon. The district court did not err in concluding that it was arbitrary and capricious for the Bureau to forgo a formal consultation with the NMFS where the NMFS specifically refused to provide the required concurrence of "no adverse impact." Where the Bureau executed these 40-year contracts without first obtaining either the required concurrence from NMFS that the proposed action was not likely to affect a threatened species or a properly issued NMFS "no jeopardy" Biological Opinion, the Bureau acted arbitrarily and capriciously and not in accordance with the law. Therefore, all of these contracts were subject to rescission.

2. Untimely Consultation with the FWS

[9] In addition to failing to request and follow through with a required consultation with NMFS, the Bureau also failed to follow its obligations under law with respect to its consultation with the FWS. The FWS has jurisdiction over several protected species in the Friant area, and the Bureau informally consulted with the FWS during 1990 and 1991. Formal consultation was requested on May 22, 1991. The FWS issued a "no jeopardy" Biological Opinion on October 15, 1991. Ten of the Friant contracts had already been executed by that time. The contracts contained Article 14, which allowed some contract modification pursuant to environmental review, and all but one of the contracts contained a provision modifying the terms dependent on the outcome of this litigation.[4]

Section 7(d) of the ESA provides:

> After initiation of consultation required under subsection (a)(2) of this section, the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section.

16 U.S.C. § 1536(d); *see* 50 C.F.R. § 402.09. The district court concluded that the 40-year water contracts constituted an irreversible and irretrievable commitment of resources and

[4]The Orange Cove contract did not include this provision. That contract was the first contract renewed and it was executed prior to the court's order requiring all future contracts to contain such a provision. However, the Bureau and the FWS had informally consulted and mutually agreed that the Orange Cove contract was not likely adversely to affect any listed species.

that the Bureau was not permitted to proceed until FWS found that the contracts were not likely to affect a protected species.[5] *See Pacific Rivers*, 30 F.3d at 1056 (following discussion of § 7(a)(2) and § 7(d), court concluded that "timber sales constitute per se irreversible and irretrievable commitment of resources"); *Lane County Audubon Soc'y v. Jamison*, 958 F.2d 290, 295 (9th Cir. 1992).

[10] The Non-federal Defendants insist that even if the water contracts are an irreversible and irretrievable commitment of resources, Article 14 prevented the foreclosure of reasonable and prudent alternatives and, therefore, § 7(d) was not violated. We do not think that an agency should be permitted to skirt the procedural requirements of § 7(d) by including such a catchall savings clause in illegally executed contracts. However, even if such a clause could preserve the contracts, Article 14 is inadequate to serve that purpose here because it limits conservation-based modifications to minor adjustments and prohibits an adjustment in the amount of water delivered. Because Article 14 does not permit a reduction in the quantity of water delivered, the reasonable and prudent alternative of reallocating contracted water from irrigation to conservation is foreclosed. The district court did not err in concluding that the Bureau violated § 7(d) when it executed the contracts prior to completing the formal consultation process with the FWS, and the contracts executed prior to the issuance of the FWS Biological Opinion are subject to rescission.[6]

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[5]The district court also concluded that there was a *per se* violation of the ESA even if the contracts in this case were not an irreversible and irretrievable commitment of resources. We need not decide whether the district court was mistaken because there was an irreversible and irretrievable commitment of resources.

[6]The district court also correctly concluded that if the Bureau is not permitted to execute contracts that constitute an irreversible and irretrievable commitment of resources *during* the formal consultation, it also was not permitted to do so *before* it had initiated formal consultation. *See* 16 U.S.C. § 1536(d); *Pacific Rivers*, 30 F.3d at 1056-57; *Conner v. Burford*, 848 F.2d 1441, 1455 (9th Cir. 1988). Therefore, all contracts executed prior to May 22, 1991, violated the ESA.

3. Mootness

The Non-federal Defendants argue that if the Bureau violated the ESA by executing the water contracts prior to the issuance of the FWS Biological Opinion, this claim became moot once a "no jeopardy" biological Opinion was issued on October 15, 1991.[7] In the May 31, 1991, Order, the district court concluded that the Biological Opinion did not moot the procedural ESA violations because the issuance of the Biological Opinion did not provide all the relief that could have been granted. The district court concluded that an appropriate remedy was still available — contract rescission — which would place the Plaintiffs in the position they would have been had the ESA been complied with before execution of the contracts.

Mootness is a question of law reviewed de novo. *Native Village v. Blatchford,* 38 F.3d 1505, 1509 (9th Cir. 1994). The Non-federal Defendants rely on *Southern Utah Wilderness Alliance v. Smith,* 110 F.3d 724 (10th Cir. 1997), as persuasive authority that the ESA claim was mooted. In *Southern Utah* an informal consultation completed after the agency action mooted the ESA claim. However, *Southern Utah* is distinguishable because (1) there was no irreversible and irretrievable commitment of resources, and (2) the only relief requested was the completed consultation.

[11] Procedural violations of the ESA are not necessarily mooted by a finding by the FWS that a substantive violation of the ESA had not occurred. The process, which was not observed here, itself offers valuable protections against the *risk* of a substantive violation and ensures that environmental concerns will be properly factored into the decision-making

[7]This argument only applies to the ESA violation arising out of the FWS consultation process. Even if the untimely FWS consultation could be mooted by the issuance of a "no jeopardy" opinion, the failure to consult with NMFS still renders the contracts subject to rescission.

process as intended by Congress. Also, due to the procedural violations here, the Plaintiffs' ability to enjoin the agency action while they challenged the validity of the Biological Opinion was negated.[8]

[12] Here, if the Biological Opinion had been rendered before the contracts were executed, the FWS would have had more flexibility to make, and the Bureau to implement, suggested modifications to the proposed contracts. *See* 50 C.F.R. § 402.14(g)(6), (j) (Service's responsibilities include formulating "discretionary conservation recommendations, if any, which will assist . . . agency in reducing or eliminating the impacts it may have on listed species or critical habitats"). Even where there is a "no jeopardy" Biological Opinion, the Service may make non-binding conservation recommendations. 50 C.F.R. § 402.14(g)(6), (j). The failure to respect the process mandated by law cannot be corrected with post-hoc assessments of a done deal.

D. Remedy of Contract Rescission

[13] Where an agency acts arbitrarily or capriciously or not in accordance with the law, the APA states that the court shall set aside the agency action. 5 U.S.C. § 706(2)(A)-(D). While the court had the discretion to preserve the contracts if the procedural flaw could have been rectified in another way, *see Weinberger v. Romero-Barcelo,* 456 U.S. 305, 320 (1982), there is no reason to compel that result here.

[14] In *Bob Marshall Alliance v. Hodel,* 852 F.2d 1223, 1230 (9th Cir. 1988), the court stated that "the proper remedy for substantial procedural violations of NEPA and the ESA is an injunction." In that case, however, the government had been enjoined by the district court from entering into more

[8]In the district court, the Plaintiffs challenged the validity of the FWS "no jeopardy" Biological Opinion. This claim was dismissed without prejudice because the contract rescission offered complete relief.

leases and the leases that were already entered into were set aside. Also, the agency action at issue did not appear to involve an irreversible and irretrievable commitment of resources. In *Forelaws on Board v. Johnson*, 743 F.2d 677, 685 (9th Cir. 1984), although we refused to issue an injunction, we noted that for NEPA violations, injunctions served the purpose of "preserv[ing] the decision makers' opportunity to choose among policy alternatives." *Id.* Where contracts have already been entered into, the opportunity to "choose" has been eliminated — all that remains is the limited ability to make the path chosen as palatable as possible. Therefore, an injunction would not serve any purpose if the contracts are not invalidated. We conclude that the district court's decision to rescind the contracts was not an abuse of discretion.

E. Unique Issues Related to Particular Contracts

1. Orange Cove

Orange Cove is uniquely situated from the rest of the Non-federal Defendants. First, the Orange Cove contract was the only contract that was executed after the Bureau and the FWS had concurred that the contract was not likely adversely to affect any protected species. Therefore, for the Orange Cove contract alone, a formal consultation with the FWS was not required before contract execution and the ESA was not violated on those grounds.

The district court concluded, however, that even though the ESA was not violated because of a flawed FWS consultation, the failure to consult with the NMFS before executing the Orange Cove contract resulted in a procedural violation. The Orange Cove contract, however, was also the only contract executed before the winter-run chinook salmon was listed as threatened in August of 1989. Orange Cove argues that because its contract was executed before the salmon was listed, the Bureau had no duty to consult with the NMFS, formally or informally, under the ESA.

The district court, on Orange Cove's motion for reconsideration, concluded that until Orange Cove had the contract validated in state court,[9] the Bureau had the power and the obligation to withdraw the contract and initiate consultation with the NMFS after the salmon was listed in August, 1989. Orange Cove argues that the district court improperly decided the validation argument because it was not addressed by the parties in their summary judgment briefs. Orange Cove also argues that the district court erred as a matter of law.

Orange Cove implicitly raised the validation argument when it moved for reconsideration and pointed out to the court that its contract was executed prior to the threatened species listing. The Orange Cove contract, on its face, states that it is not binding on the United States until it is validated in state court. Both sides had an opportunity to address this argument in writing a year before the district court issued its January 16, 1997, Order.

Orange Cove argues that after the contract was executed in May, 1989, there was no "agency action" that would require reinitiation of an ESA consultation. However, even though the government was not under a contractual obligation to deliver water to Orange Cove from February 28, 1989, until February 22, 1990, the government continued to do so and that activity constituted discretionary agency action. The ESA regulations

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[9]Clause 30 of the Orange Cove contract provides as follows:

> The Contractor, after execution of this contract, shall promptly seek to secure a decree of a court of competent jurisdiction of the State of California, confirming the execution of this contract. The Contractor shall furnish the United States a certified copy of the final decree, the validation proceedings, and all pertinent supporting records of the court approving and confirming this contract, and decreeing and adjudging it to be lawful, valid, and binding on the Contractor. *This contract shall not be binding on the United States until such final decree has been secured.*

Contract between the United States and the Orange Cove Irrigation District (emphasis added).

state that "[r]einitiation of formal consultation is required and shall be requested . . . where discretionary Federal involvement or control over the action has been retained or is authorized by law and . . . a new species is listed . . . ." 50 C.F.R. § 402.16. The discretionary activity of delivering water without a contract, coupled with the fact that the Orange Cove contract explicitly stated that the United States was not bound by the contract until it was validated in state court, support the district court's conclusion that the Bureau had an obligation to withdraw the contract and initiate an NMFS consultation once the salmon was listed. *See Pacific Rivers*, 30 F.3d at 1053-56 (ESA consultation required for ongoing projects once new threatened species listed). We conclude that the district court did not err in setting aside the Orange Cove contract.

2. Chowchilla and Madera

Chowchilla and Madera argue that their contracts are unique from the other Non-federal Defendants because Madera and Chowchilla had originally possessed the land where the Friant dam was built and had adjudicated rights to the water of the San Joaquin River. In return for conveying the land and the water rights to the United States, Madera and Chowchilla argue that their 1939 contracts guaranteed a permanent supply of water from the Friant dam of 270,000 acre feet of water annually. That contract was replaced by a 1951 contract. Madera and Chowchilla argue that when the 1951 contract expired, they were reinvested with their rights under the 1939 contract and, therefore, they are exempt from the ESA. However, in *Madera Irrigation Dist. v. Hancock*, 985 F.2d 1397, 1405-06 (9th Cir. 1993), the court concluded that these districts are not exempt from requirements under NEPA and the ESA. Chowchilla's and Madera's arguments to the contrary are without merit.

3. Chowchilla, Terra Bella and Delano-Earlimart

Chowchilla, the Terra Bella Irrigation District and the Delano-Earlimart Irrigation District argue that even though

their contracts were executed by the Bureau prior to the issuance of the FWS Biological Opinion, all three were validated by the state court after the October 15, 1991, "no jeopardy" Biological Opinion was issued. Therefore, they argue that the validation date serves to keep their contracts from violating the ESA.

This argument was not raised in the district court and we decline to consider it for the first time on appeal. *See Parks Sch. of Bus., Inc. v. Symington*, 51 F.3d 1480, 1487 n.4 (9th Cir. 1995) (failure to raise issue before the district court constitutes a waiver of that issue).

II. National Environmental Policy Act

[15] NEPA requires all federal agencies to consider the environmental consequences of all "major Federal actions significantly affecting the quality of the human environment" by preparing an EIS before undertaking the action. 42 U.S.C. § 4332(2)(C). Instead of preparing an EIS, an agency may make a factual determination that an EIS is unnecessary by conducting an environmental assessment (EA) of its proposed action and issuing a Finding of No Significant Impact (FONSI) on the environment. *See* 40 C.F.R. § 1501.4; *Sierra Club v. United States Forest Serv.*, 843 F.2d 1190, 1193 (9th Cir. 1988). NEPA is not retroactive and only applies to major agency actions that occurred after 1969.

[16] It is undisputed that the Bureau did not prepare an EA or an EIS before renewing these water contracts. The Bureau argues that there is no need for this court to address the NEPA issue because if these 14 contracts are rescinded, then the Plaintiffs have received complete relief. The CVPIA requires the government to complete an EIS before it may enter into any subsequent Friant renewal contracts. CVPIA, Pub. L. 102-575, § 3404(c)(1), 1992 U.S.C.C.A.N. (106 Stat.) at 4709. Where intervening legislative changes settle a controversy, the action may be moot. *Nevada v. Watkins*, 943 F.2d

1080, 1083 (9th Cir. 1991). We conclude that the NEPA issue has been mooted by the remedy of contract rescission and CVPIA's requirement that an EIS be completed on this dam before the re-execution of the contracts.

III. Section 5937 of the Fish and Game Code

Section 5937 of the California Fish and Game Code states:

> The owner of any dam shall allow sufficient water at all times to pass through a fishway, or in the absence of a fishway, allow sufficient water to pass over, around or through the dam, to keep in good condition any fish that may be planted or exist below the dam.

In the Order of April 30, 1992, the district court concluded that the Bureau was not exempt from § 5937 and denied the motion to dismiss. *See* 791 F. Supp. at 1431-36. The district court also concluded that the CVPIA did not preempt § 5937. *See* Order of October 7, 1993. In the January 16, 1997, Order, the district court concluded that, due to the contract invalidations, the § 5937 claim was not ripe. We hold that the district court erred and remand for a determination on the merits.

[17] Ripeness is a question of law reviewed de novo. *San Diego County Gun Rights Comm. v. Reno,* 98 F.3d 1121, 1124 (9th Cir. 1996). A case is generally considered ripe if: (1) the relevant issues are sufficiently focused to permit judicial resolution without further factual development, *see Clinton v. Acequia, Inc.,* 94 F.3d 568, 572 (9th Cir. 1996); and (2) the parties would suffer a hardship by the postponement of judicial action, *see Abbott Lab. v. Gardner,* 387 U.S. 136, 149 (1967). Where the Bureau is not complying with § 5937 and its obligation to comply with § 5937 is in dispute, a determination of the § 5937 issue is ripe. The rescission of the 14 water contracts is unrelated to the timeliness of the § 5937 claim. The § 5937 claim is directed towards the owner of the

dam, the Bureau, whose duty to comply with state law, if the law applies, exists independent of any contractual arrangements with the Non-federal Defendants.

The Non-federal defendants challenge the district court's ruling that § 5937 was not, on its face, preempted by federal law. We affirm on the facial preemption issue.

Section 8 of the Reclamation Act provides:

> Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws . . . .

43 U.S.C. § 383. In *California v. United States,* 438 U.S. 645 (1978), the Court stated that the "cooperative federalism" of § 8 required the United States to comply with state water laws unless such a law was directly inconsistent with clear congressional directives regarding the project. *Id.* at 650, 678. On remand to the Ninth Circuit, this court concluded that the term "congressional directive" meant a preemptive federal statute. *United States v. California,* 694 F.2d 1171, 1176-77 (9th Cir. 1982).

[18] The CVPIA provides that Friant dam water is not to be released from the Friant dam to comply with the provisions of the CVPIA regarding the development of a plan to reestablish fish below the dam. CVPIA, Pub. L. No. 102-575, § 3406(c)(1), 1992 U.S.C.C.A.N. (106 Stat.) at 4721.[10] The

[10]Section 3406(c)(1) of the CVPIA provides:

> The Secretary shall . . . develop a comprehensive plan, which is reasonable, prudent, and feasible, to address fish, wildlife, and

Non-federal Defendants argue that this provision is a clear congressional directive that water is not to be released from the Friant dam pursuant to any law, state or federal, until it is specifically approved by Congress. However, the statute states that there are not to be any releases of the Friant dam water "as a measure to implement this title," this title being the CVPIA. It would have been a simple matter for Congress to bar the release of Friant dam water, without including the clause "as a measure to implement this title" twice in the same sentence. There is no clear directive in the CVPIA which preempts the application of § 5937 if the state law could be implemented in a way that is consistent with Congress' plan to develop and restore fisheries below the Friant dam in a manner that is "reasonable, prudent, and feasible." CVPIA, Pub. L. 102-575, § 3406(c), 1992 U.S.C.C.A.N. (106 Stat.) at 4721.

[19] The district court, as the Bureau points out, never explicitly ruled that § 5937 applied to the Friant dam. There are several other issues that the district court did not address. For example, the district court did not determine whether § 5937 is applicable to the Friant dam under state law. It is preferable to determine whether the state law applies before reaching a determination that state law has been preempted. The district court also did not reach the issue of whether the actual application of § 5937 is inconsistent with the CVPIA. It has yet to be determined how much water release would be required under § 5937 and whether that would be consistent with the CVPIA. We remand these issues to the district court for a determination on the merits.

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habitat concerns on the San Joaquin River . . . During the time that the Secretary is developing the plan provided for in this subsection, and until such time as Congress has authorized the Secretary to implement such plan . . . the Secretary shall not, as a measure to implement this title, make releases for the restoration of flows between Gravelly Ford and the Mendota Pool and shall not thereafter make such releases as a measure to implement this title without a specific Act of Congress authorizing such releases.

IV. Improper Use of Evidence

With their summary judgment motion, the Plaintiffs filed three expert affidavits which addressed the environmental impacts of the Friant dam. The Non-federal Defendants filed a motion to strike these affidavits which the court denied. The Non-federal Defendants claim that these affidavits addressed disputed factual issues, and that they were not permitted to cross-examine the experts or conduct discovery to respond to the assertions in the affidavits. In the Order of May 31, 1995, the district court appears to rely on these affidavits, in part, and stated that the Plaintiffs' "extensive scientific ecological evidence documents" indicated that the total diversion of the river caused environmental harm. The Non-federal Defendants contend that the district court abused its discretion in denying further discovery in violation of Fed.R.Civ.P. 56(f). The Non-federal Defendants also claim that the affidavits were irrelevant to the legal questions at hand.

We review the district court's discovery rulings for an abuse of discretion. *Amarel v. Connell,* 102 F.3d 1494, 1515 (9th Cir. 1996). The district court may continue a motion for summary judgment if the opposing party needs time to conduct further discovery. *See* Fed.R.Civ.P. 56(f); *Garrett v. City and County of San Francisco,* 818 F.2d 1515, 1518 (9th Cir. 1987). A refusal to permit further discovery pursuant to Rule 56(f) is reviewed for an abuse of discretion. *Nidds v. Schindler Elevator Corp.,* 113 F.3d 912, 920 (9th Cir. 1996), *cert. denied* 118 S. Ct. 369 (1997). "We will only find that the district court abused its discretion if the movant diligently pursued its previous discovery opportunities, and if the movant can show how allowing additional discovery would have precluded summary judgment." *Qualls v. Blue Cross of Cal., Inc.,* 22 F.3d 839, 844 (9th Cir. 1994).

The Non-federal Defendants' Rule 56(f) argument is without merit. The Non-federal Defendants never formally filed a Rule 56(f) motion requesting a continuance of the summary

judgment hearing to conduct further discovery. They contend that their motion to strike should have served as a Rule 56(f) motion. But that motion, which was not made until six months after the summary judgment decision was issued, was clearly untimely for Rule 56(f) purposes. Regardless of whether the Non-federal Defendants raised a timely 56(f) motion or diligently pursued discovery, the Non-federal Defendants have not pointed to any evidence that they could have discovered that would have precluded summary judgment. *See Garrett,* 818 F.2d at 1518.

On the relevancy issue, the Plaintiffs assert that the expert affidavits were relevant to the legal issue of whether the water contracts were an irreversible and irretrievable commitment of resources. The district court did rely on the declarations regarding environmental harm to conclude that there was an irreversible and irretrievable commitment of resources. However, it appears that the court could have reached the same legal conclusion without any concrete evidence of ecological harm. *See Pacific Rivers,* 30 F.3d at 1057 (timber sales constitute per se irreversible and irretrievable commitment of resources). Therefore, if there were any error it was harmless.

CONCLUSION

We conclude that the Bureau violated the ESA by making irreversible and irretrievable commitments of resources prior to completing the required consultations with the FWS and the NMFS. The remedy of contract rescission was well within the district court's discretion. The NEPA issue is moot. However, we reverse the holding that the § 5937 claim was unripe and remand for a determination of that issue. The Plaintiffs shall recover their costs on appeal from the Non-federal Defendants. The Federal Defendants shall bear their own costs on appeal.

AFFIRMED in part, REVERSED and REMANDED in part.

APPENDIX B.

APPROPRIATE ORDERS OF THE DISTRICT COURT

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For Appropriate Orders of the District Court, Petitioners adopt the Appendix attached to the Petition For Writ of Certiorari filed on behalf of Friant Water Users Authority, et al.

APPENDIX C.

CONSTITUTIONAL PROVISIONS AND STATUTES

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FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shell be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

For all other Federal and State Statutes, Petitioners adopt the Appendix attached to the Petition For Writ of Certiorari filed on behalf of Friant Water Users Authority, et al.